United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1452

United States Court of Appeals

FOR THE SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

Appellee,

vs.

LOUIS SORRENTINO,

Defendant-Appellant.

PETITION OF LOUIS SORRENTINO, APPELLANT, FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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On Appeal from the United States District Court for the Southern District of New York

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PETITION OF APPELLANT

Preliminary Statement

Louis Sorrentino petitions for a rehearing of his appeal to the United States Court of Appeals for the Second Circuit from a judgment of conviction entered on September 30, 1976, in the United States District Court for the Southern District of New York, which judgment was affirmed.

Statement of the Case

The appellant, Louis Sorrentino, was tried before the Honora'e Edward Weinfeld, United States District Judge, and a jury, on September 8 and 9, 1976, in the United States District Court for the Southern District of New York, and was convicted on two counts contained in Indictment 76 Cr. 626. Said indictment charged three defendants, but only Sorrentino stood trial.

Sorrentino was convicted of having conspired to distribute cocaine, in violation of Title 21, United States Code, Section 846, and with having distributed and possessed, with the intent to distribute, approximately 55.94 grams of cocaine, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). On September 30, 1976, Judge Weinfeld sentenced Sorrentino to concurrent terms of three years imprisonment on each count and three years special probation.

A notice of appeal was duly filed on October 8, 1976, which appeal was subsequently perfected. Appellant raised three issues on appeal, to wit:

1. There was a prejudicial and material variance between the indictment and the proof at trial, which affected appellant's right to a fair trial, in that the indictment charged one conspiracy and one transaction, whereas the proof evidenced at least two conspiracies with many transactions.

2. The trial court admitted hearsay evidence without having met the threshhold test of a fair preponderance of the independent evidence necessary to render such hearsay evidence admissible, which independent evidence was insufficient for a reasonable mind to fairly conclude that the appellant was guilty beyond a reasonable doubt on the two counts charged in the indictment.

3. The appellant's rights were violated by the admission into evidence of incriminating hearsay statements of fugitive Green, which statements were crucial to the Government's case, were clearly inculpatory to appellant, and which lacked the requisite indicia of reliability so as to permit their admissibility without violating appellant's Sixth Amendment right of confrontation.

Argument on this appeal was heard on January 18, 1977, and the judgment of conviction was thereupon affirmed by a panel comprised of Judges Mulligan, Lumbard and Feinberg.

ARGUMENT

The decision of the panel in this case is incorrect.

It is respectfully submitted that the decision of the panel, in affirming the judgment of conviction against appellant, was incorrect, in that it overlooked or misapprehended the significance of the Supreme Court's decision in *Dutton* v. *Evans*, 400 U.S. 74, 91 S.Ct. 210.

The indictment by which the appellant was charged, also named two alleged co-conspirators, Hunter and Green. At the time of trial, Hunter had pleaded guilty to the first count of the indictment and had agreed to testify on behalf of the government, and Green was a fugitive.

The judgment of conviction was obtained primarily as a result of testimony given by Hunter, and Steven Newman, a government informant, which testimony was based largely on extra-judicial statements made to them by Green.

Newman was a previously convicted felon who had been arrested by state officials for the sale of cocaine, in an unrelated case (Tr. 13) and who had agreed to cooperate

with federal and state officials (Tr. 14) in the hope of being sentenced to lifetime probation rather than a minimum of six years and a maximum of life imprisonment (Tr. 13). His testimony concerned the arrangement for the sale of cocaine between Hunter and Green, and that he had been informed by Green and Hunter that the cocaine in question belonged to "Lou", from "the San Souci" (Tr. 23-26). At no time during the course of his testimony did Newman claim that he had ever met or talked with the appellant Sorrentino.

Likewise, Hunter's testimony with regard to the sale of cocaine resulted almost exclusively from conversations he had or had overheard from the fugitive defendant Green. In fact, Hunter conceded that when Green telephoned to arrange for the purchase of the cocaine, Hunter neither saw the number that was dialed, nor heard the voice on the other end (Tr. 69) and that the only knowledge he had of the telephone call was as a result of statements made to him by Green (Tr. 71, 72). There is no testimony by Hunter that he met or spoke with the appellant Sorrentino at any time during the course of the transactions resulting in the February 12, 1976 sale of cocaine.

Accordingly, the testimony of Hunter and Newman, which was clearly inculpatory as to the appellant, was based substantially upon the statements made to them by the fugitive defendant Green, and the admission of those hearsay statements was crucial to the government's case.

The only evidence elicited at trial, which was independent of those hearsay statements, was that appellant was manager of the San Souci bar; that he signed a pick-up receipt for a car leased by another, 8 days prior to the date of the substantive count; that he drove Green to the Gorham Hotel; and that prior to Green's arrest, he

left the area proceeding 8 to 10 miles per hour, having initially pulled out from his parking place with the front lights off.

It is apparent that without the admission of Green's hearsay statements, the government could not have proved a prima facie case against the Appellant, and that the indictment would have been dismissed.

In *Dutton* v. *Evans*, *supra*, the Supreme Court considered the relationship between the hearsay exception for statements made by co-conspirators in the furtherance of the conspiracy, and the rights of a defendant provided by the Confrontation Clause of the Sixth Amendment. The Court held as follows:

> "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now." 400 U.S. at 86.

However, the Court went on to cite reasons why the defendant had not been denied the right of confrontation. (400 U.S. at 88, 89) thereby setting forth the basis whereby the hearsay exception would be permitted despite the failure to provide the defendant with his rights of confrontation as provided by the Sixth Amendment:

> "These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant."

It is respectfully submitted that the trial court and this Court failed to apply the aforesaid standard for the admission of hearsay testimony as set forth in *Dutton*, in that there was no determination that there were indicia

of reliability so as to warrant admission of the hearsay statements of Green as aforesaid.

It seems evident that in the instant case, the testimony of Hunter and Newman with regard to the extra-judicial statements made by Green are without the requisite indicia of reliability to permit their admission into evidence. Newman's testimony was occasioned by his desire to avoid life imprisonment and obtain lifetime probation (Tr. 13, 14). Surely, he was attempting to be as cooperative as possible in supporting the government's case. The co-defendant Hunter was also likely to be obliging in his testimony in that he was seeking to have the second count of the indictment dismissed and to receive as favorable a sentence as could be given (Tr. 51, 52).

Prior to the admission of Green's hearsay statements, the trial judge failed to establish that there existed indicia of reliability insofar as Green's motives in making such statements are concerned, so as to warrant admission. The admission of those statements, therefore, completely disregards the import of *Dutton*, and is all the more offensive since those statements constitute the only evidence which substantively links Appellant to the sale of cocaine at issue.

In *United States* v. *Puco*, 476 F.2d 1099 (2nd Cir.) this Court decided a question regarding the admissibility of out of court statements of a co-conspirator, similar to the issue in the instant action. In *Puco*, this Court applied the standards of *Dutton* and made a specific finding that there were indicia of reliability as to the extra-judicial statements made by a co-conspirator to a government agent, so as to warrant their admissibility.

Apparently, this Court had thereby adopted the guidelines of *Dutton*. However, those standards were obviously not applied in the instant case.

Other Circuits have followed Dutton in requiring indicia of reliability before admitting into evidence the extra-judicial statements of co-conspirators. See *United States* v. *Weber*, 437 F.2d 327, 335-340 (3rd Cir. 1970) *cert. denied* 402 U.S. 932, 91 S. Ct. 1524, 28 L. Ed. 2d 867 (1971); *United States* v. *Kelley*, 526 F.2d 615 (8th Cir. 1975); and *United States* v. *Adams*, 446 F.2d 681 (9th Cir. 1971), *cert. denied* 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 867 (1971).

The government, in its brief on appeal (p. 19) concedes that it has taken the position, despite the *Dutton* and *Puco* decisions, that a separate finding of "indicia of reliability" should be required. This contention is contrary to the law of those cases and the standards which have been adopted by other Circuits, as aforesaid. Furthermore, the government made no attempt to refute appellant's argument that the hearsay statements admitted into evidence were crucial to its case and devastating to the defense.

In fact, rather than indicia of reliability, Green's statements to Hunter, Newman and Detective Rinaldi were replete with motives to falsify. Firstly, Green was trying to give the impression he was mob connected, with all its attendant protection, therefore referring to an Italian named "Lou" as his source (Tr. 79); secondly, Green was unlikely to reveal the true source of the cocaine, since Newman could thereafter eliminate the middleman in any such transactions, being clearly against Green's pecuniary interests; further, the statements by Green were not against his penal interests since he was known by Hunter, Newman and Rinaldi to be part of the cocaine transaction, but Green's experience in such dealings would lead him to implicate as few individuals as possible, to insure his own safety.

It seems clear, then, that the panel, in its decision, adopted the government's position and thereby overlooked or misapprehended the significance of *Dutton*, and the cases which have followed the guidelines set forth in *Dutton* including *U.S.* v. *Puco*, decided by this Circuit.

As Chief Judge Friendly pointed out in his dissenting opinion in *Puco*, the adoption of the *Dutton* standards in that case was a modification of a rule of evidence which had been applied in this Circuit in a number of decisions. (476 F.2d at 1111). The confusion which Chief Judge Friendly had predicted is made eminently clear by the problem which the appellant Sorrentino faced in this action.

It is illogical to claim as the government contends, that the appellant Sorrentino has been afforded his rights of confrontation and that the guidelines of *Dutton* have been satisfied by the opportunity appellant was afforded to cross-examine Hunter and Newman. Certainly, the question of credibility is one for the jury to determine, but there was no opportunity to observe or cross-examine Green. However, Green's statements were admitted into evidence without indicia of reliability having been established therefor, and it is the truth of those statements upon which the question of conviction or acquittal turned.

Hence, Judge Friendly argued for a reconsideration of the evidentiary issues presented in *Puco*, by a rehearing in banc, to avoid such chaos. (476 F.2d at 1111). Speaking of the *Dutton* decision, Judge Friendly said:

> "Some judges may decide to disregard it. Others will attempt to apply it, although I am at a loss to know how they can since the panel supplies no guidelines as to what additional 'indicia of reliability' will suffice." (476 F.2d at 1111)

It is respectfully submitted that the Court has chosen to disregard *Dutton*, and that the conviction of appellant resulted from that decision. Speaking of *Puco*, and the same evidentiary problem presented by appellant's case, Judge Friendly said:

> "I cannot think of a case more clearly demanding en banc consideration." (476 F.2d at 1111).

Appellant requests a rehearing of his appeal by this Court, in banc.

CONCLUSION

Appellant's petition for a rehearing of his appeal or for a rehearing in banc should be granted.

Respectfully submitted,

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copies of

Petition is hereby admitted this

2d Feb, 1977

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